was the Tay Koh Yat bus that went to the wrong side of the road and collided into the Hock Lee bus. The onus, therefore, rests upon the third respondent to show that the Tay Koh Yat bus went to the wrong side of the road without any negligence on the part of their driver.

The main question is, has the third respondent discharged that onus? In our view they have not.

The trial judge accepted the evidence of the driver of the bus and rejected the evidence of the motor cyclist on the ground that if the motor cyclist had remained stationary he would have been killed on the spot and also that he was a most evasive witness who continuously shifted his ground. The trial judge accordingly preferred the version given by the driver of the bus.

It is clear, therefore, that the trial judge did not base his preference for the version of the driver of the bus on demeanour and furthermore this court, as an appellate court, is under a duty to re-hear the case by examining the evidence and arriving at its own finding, but always bearing in mind it has neither seen nor heard the witnesses and paying due regard to the trial judge's finding and his reasons therefor. The fact that the motor cyclist would have died on the spot had he remained stationary is a conclusion which, in our opinion, cannot be supported on the evidence before him. That conclusion seems to us to be a matter of pure conjecture. Again the conclusion of the trial judge that the motor cyclist continuously shifted his ground in his evidence cannot be supported. He told a simple story from beginning to end namely that he remained stationary on the middle of the road waiting to turn right into Leonie Hill Road when he was hit by the bus and thrown clear to the left.

The question remains, which version is the more probable of the two? It is impossible to accept as true or possible the bus driver's evidence that travelling at a speed of between 15 to 20 m.p.h., his bus not more than 7 to 10 feet from the motor cyclist, stationary on the middle of the road, that the motor cyclist could swerve left suddenly and be across the path of his bus and that he could manage to, at the same time, swerve violently right and manage to strike a mere glancing blow on the motor cycle.

As often happens, a court on the evidence before it, has to decide which of two conflicting versions is the version to accept. In such a case, a court in considering which is the more probable one, ought to try and derive what assistance it can get from undisputed facts, if any, which are relevant for the purpose. A court also ought to consider, from undisputed facts, whether a version put forward as evidence is one which is inherently improbable or not.

For all these reasons, we had no hesitation at the conclusion of the hearing in coming to the conclusion that the motor cyclist's version was the more probable one and accordingly we allowed the appeal.

Appeal allowed.

Solicitors: *Murphy & Dunbar; A. S. K. Wee.*

CHUA BEOW HUAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) February 27, 1970]

[Malacca — Criminal Appeal No. 11 of 1968]

Evidence — Statement to customs officer — Whether admissible — Judges' Rules — Customs Ordinance, 1952, ss. 115 & 131(2) — Evidence Ordinance, 1950, ss. 24, 25 & 26.

Customs and Excise — Statement to customs officer — Customs Ordinance, 1952, ss. 115 & 131(2).

Criminal Law and Procedure — Presumption — Customs cases — Burden of proof.

Legislation — Express provision of statute — Legal maxims — Importance of — Reduction and modification.

The appellant had been convicted of importing dutiable goods on which duty had not been paid. On appeal, one of the grounds of appeal was that a statement to a customs officer by the appellant had been wrongly admitted in evidence. It was argued that the statement was not admissible under section 24 of the Evidence Ordinance and that there was a breach of the Judges' Rules in obtaining the statements of the appellant.

Held, dismissing the appeal: (1) "customs officers" are not police officers for the purposes of sections 25 and 26 of the Evidence Ordinance;

(2) there was no evidence in this case to show that the statements had been made as a result of any inducement, threat or promise and therefore the statements were not inadmissible under section 24 of the Evidence Ordinance;

(3) there is no rule whether of law or practice which require a customs officer in this country to follow the Judges' Rules framed by the judges in England.

Per curiam: In giving his grounds of judgment the learned magistrate (or the learned president) should briefly state the matters both of fact and law which he considered, the care which he exercised in considering those matters, and the extent and nature of doubt, if any, created in his mind. He should discuss the evidence and the probabilities arising from the circumstances of the case. The reasons for his findings should be stated. The grounds should indicate that he had in fact applied his mind to the evidence produced in the case.

Cases referred to:-

(1) *Saminathan & Ors.* v. *Public Prosecutor* [1955] M.L.J. 121.

(2) *Public Prosecutor* v. *Tay Yam Peng* [1951] M.L.J. 144.

(3) *Man Woo* v. *Rex* [1951] M.L.J. 20.

(4) *Soni Vallabhdas Liladhar* v. *The Assistant Collector of Customs* A.I.R. 1965 S.C. 481.

(5) *Brown* v. *Dunn* (1893) 6 The Reports 67.

(6) *A.E.G. Carapiet* v. *A.Y. Derderian* A.I.R. 1961 Cal. 359.

(7) *William Charles Cowell* 27 Cr. App. R. 191.

(8) *Public Prosecutor* v. *Soh Tuan Cheung* [1949] M.L.J. 261.

(9) *Chye Ah San* v. *Regina* [1954] M.L.J. 217.

(10) *Regina* v. *Bass* 37 Cr. App. R. 51; [1953] 1 Q.B. 680.

(11) *The King* v. *Voisin* [1918] 1 K.B. 531.

(12) *Cheong See Leong* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 56.

(13) *Cheng Seng Heng & Ors.* v. *Public Prosecutor* [1949] M.L.J. 175.

(14) *Ah Soi* v. *King Emperor* A.I.R. 1926 Cal. 922.

(15) *R.* v. *Czerwinski* [1954] A.L.R. 621.

(16) *Regina* v. *Camborne Justices Ex parte Pearce* [1954] 2 All E.R. 850.

(17) *The Queen* v. *Farrant* (1887) 20 Q.B.D. 58.

(18) *The Queen* v. *Rand* (1866) 1 Q.B.D. 230.

(19) *Rex* v. *Sussex Justices Ex parte McCarthy* [1924] 1 K.B. 256.
(20) *Udal* v. *Walton* 14 N. & W. 254 at 256.
(21) *Goh Yin Guan* v. *Public Prosecutor* [1967] 1 M.L.J. 113, 114.
(22) *Pyare Lal* v. *State of Rajasthan* A.I.R. 1963 S.C. 1094.
(23) *Abdul Majid* v. *Public Prosecutor* Malacca Cr. Appeal No. 20 of 1969 (unreported).
(24) *Lee Kim Yin* v. *Public Prosecutor* [1949] M.L.J. 112, C.A.
(25) *Balasingham* v. *Public Prosecutor* [1959] M.L.J. 193.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

Sharma J.: The appellant left Singapore on the morning of 12th March 1966 in a van bearing registration number BF 319. He was accompanied by D.W. 2 and D.W. 3 who were jointly charged with the appellant but were acquitted and discharged by the learned president after he had heard the defence. The van contained certain goods both inside and on top of its roof. On reaching the customs at Johore Bahru the appellant handed two declaration forms (Exhibit P1A & P1B) to P.W. 2. Exhibit P1A was a declaration in respect of the dutiable goods and Exhibit P1B in respect of non-dutiable goods. P.W. 2 asked the appellant to open the back door of the van and carried out a check of the goods which were inside the van. He also inspected some of the goods which were on top of the van. The van passed through the customs and was subsequently stopped between Gemas and Tampin at the 23rd mile Tebong by the senior customs officer P.W. 5. D.W. 3 was driving the van at that time. P.W. 5 questioned the appellant if the van carried any uncustomed goods. According to P.W. 5 the appellant was at first reluctant but later admitted that the van carried one gross of playing cards on which duty had not been paid and that those playing cards were purchased in Singapore. P.W. 5 obtained from the appellant a duplicate copy each of the declarations P1A and P1B. (These duplicates were produced as Exhibits P3A and P3B.) The appellant was brought to Malacca where the assistant superintendent of customs (P.W. 7) questioned him through the interpretation of P.W. 5. The appellant told P.W. 7 that although he stopped at Johore Bahru and Segamat before he was stopped by P.W. 5 he did not load or pick up any goods at those places. He further admitted to P.W. 7 that besides the goods included in the customs declarations P1A and P1B he had one gross playing cards. A parcel wrapped in brown paper was produced from the top of the van and that parcel contained playing cards. P.W. 7 then asked another customs officer (P.W. 6) to examine the goods placed on top of the van. 15 packages containing match boxes, 6 packages containing playing cards and 2 packages containing lighter fuel were found by P.W. 6 on top of the van. The 15 packages containing match boxes and the 6 packages containing playing cards were wrapped in brown paper. So in all 7 packages containing 84 dozen packs of Alladin playing cards (Exhibit P4), 15 cartons containing 36,000 boxes of "222" brand matches (Exhibit P7) and 2 packages containing 12 dozen tubes of Globe brand lighter fuel (Exhibit P8) were found from among the goods on top of the van. The goods on top of the van were covered with tarpaulin. The appellant admitted to P.W. 7 that the undeclared goods belonged to him, that he had purchased them at Singapore and that no duty had been paid on them. The prosecution case was that the appellant did not declare the goods (Exhibits P6 to P8) and that he conveyed them without paying any duty with the intention to defraud the Government of the customs duty which was payable in respect thereof. The defence was that the goods (Exhibits P6 to P8) were purchased by the appellant at a shop at Tampoi after his arrival in Johore Bahru. The appellant produced 3 receipts Exhibits D13, D14 & D15 to support his defence. The learned president considered the receipts fictitious and deliberately devised only for the purpose of creating evidence for the appellant. The learned president found the appellant guilty and convicted him.

The decision of the learned president is attacked mainly on the following grounds:

(i) Statements made by the appellant to P.W. 5 and P.W. 7 were not admissible under section 24 of the Evidence Ordinance.
(ii) There was breach of the Judges' Rules by P.W. 5 and P.W. 7 in obtaining the statements of the appellant.
(iii) P.W. 5 acted as an interpreter between the appellant and P.W. 7; he had an interest in the case and any admission made by the appellant through the interpretation of P.W. 5 should have been held inadmissible.
(iv) The learned president should have directed his mind to find out whether admissions made by the appellant were in fact true.
(v) There was no independent corroboration.
(vi) The learned president failed to consider those parts of the evidence of P.W. 2 which were in favour of the appellant.

The appellant was charged with offences under sections 129(1)(e) and 131(1)(e) of the Customs Ordinance 1952. When goods arrive into this country by road a declaration is required to be made on their arrival by the importer of such goods. An importer is defined by the Customs Ordinance 1952 (hereinafter referred to as the Ordinance) and this definition includes a person for the time being in possession of such goods. The appellant was obliged under section 75 of the Ordinance to make a declaration in respect of the dutiable goods.

Section 115 of the Ordinance reads:

"If in any prosecution in respect of any goods for non-payment of duties ... any dispute arises whether the customs duties have been paid in respect of such goods, whether the same have been lawfully imported ... or loaded ... or concerning the place whence such goods were brought or where such goods were loaded ... then and in every such case the burden of proof thereof shall lie on the defendant in such prosecution."

Similarly section 131(2) of the Ordinance provides that: —

"Without prejudice to the generality of section 106 of the Evidence Ordinance, in any prosecution under this section or section 135 of this Ordinance any uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

The onus of proving that the goods Exhibits P6 to P8 were loaded at Tampoi and not brought by the appellant from Singapore was on the appellant. If the appellant did in fact purchase those goods at Tampoi he did not have to make a declaration under section 129 of the Ordinance and he could not be said to be knowingly concerned in conveying those goods with the intention to defraud the government of the customs duty payable thereon. The appellant did not have to prove his case beyond reasonable doubt. The nature of the evidence and the extent of proof which he had to produce and give was only such that the court, looking at it with ordinary reason and care and asking itself "Could it be reasonably true?" was able to find an answer in the affirmative. Dealing with the presumption under section 131(2) of the Ordinance, Buhagiar J., in *Saminathan & Ors.* v. *Public Prosecutor*[1] said:

"It seems to me, however, that these statutory presumptions are really nothing more than an extension of the provisions of section 106 of the Evidence Ordinance 1950 which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

In the same case Buhagiar J. said:

"The fundamental principle in criminal cases is that there is a burden on the prosecution, which never shifts, to prove its case; it is not upon the accused to prove his innocence and in that sense the burden on the defence is not as high as that of the prosecution; to entitle the accused to an acquittal it is sufficient if he raises a doubt in the prosecution case and this he may do by 'disproving' a material fact on which the prosecution relies or by proving facts from which it may be inferred that a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon the supposition that that fact exists.

The facts on which the defence rely must however be 'proved' and they are proved not by showing merely a possibility that such facts exist but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case."

The appellant stated that he bought the goods Exhibits P6, P7 & P8 from a shop at Tampoi and he produced three cash sale invoices Exhibits D13, D14 & D15 in support of his contention. Two of these cash sale invoices (Exhibits D14 & D15) are in Chinese. Only one (Exhibit D13) appears to be in respect of goods which could be said to be purchased at Tampoi on 12.3.69. The other two are from different shops at Johore Bahru and are in respect of purchases obviously made not on 12.3.69 but on 10.3.69. The defence, however, was that all the goods (Exhibits P6, P7 & P8) were purchased from one shop at Tampoi and not from three different shops, one at Tampoi and two at Johore Bahru. The learned president, in my view, was therefore right in dismissing the defence by saying "Neither was his defence probable, reasonable or consistent with innocence in all the circumstances of this case."

One is, however, not entitled to infer the guilt of the appellant from the mere fact that the explanation he gave was rightly rejected by the learned president. A process in a criminal trial may negative the innocence of the accused but that negative process *per se* does not establish the guilt of the accused which the law requiries the prosecution to prove by positive evidence. There is always a duty on the prosecution to prove its case and that duty has to be discharged before an accused can be convicted.

The learned president, after holding a trial within a trial, held that the statements made by the appellant to P.W. 5 and to P.W. 7 (through the interpretation of P.W. 5) were admissible. He thus found that the admissions made by the appellant to P.W. 5 and P.W. 7 were made voluntarily and that such admissions did not "appear" to him to have been made as a result of any inducement, threat or promise from either P.W. 5 or P.W. 7. A "police officer" is not defined either in the Evidence Ordinance or in the Criminal Procedure Code. The Police Act 1967 defines him as a member of the Royal Malaysian Police. It seems from the authorities that whether a person is for the purposes of section 25 of the Evidence Ordinance a police officer or not depends not on the garb or designation of the person but on the nature of his functions and powers. The Customs Ordinance confers on the customs officers certain powers and imposes upon them certain duties. Section 129(1), 130(1), 131(1), 132 & 133(1) of the Ordinance declares the acts enumerated therein to be "offences". The Ordinance gives to the customs officers powers of search, seizure and arrest (see sections 104 to 112). They are also clothed with the powers of prevention, detection and investigation of the offences under the Ordinance. The question that naturally arises is whether the powers which are conferred on the customs officers and the duties which they have to discharge constitute them "police officers" within the meaning of section 25 of the Evidence Ordinance. The answer to my mind has to be found in the specialised role which the customs officers began to play with the increase of the country's trade whether by import or export. The number and type of offences has continued to increase with the increase in the powers of the State and the increase in its legislation. The enforcement officers of various departments came to be entrusted with specialised duties and powers for the effective fulfilment of the objects for which that particular legislation was enacted. The duties and powers of a police officer are laid down in sections 19 to 33 of the Police Act 1967. The powers given to the customs officers are limited and are all aimed at the prevention or detection of the smuggling of goods and the apprehension of persons found smuggling. The power of search and seizure of goods given to them has again the same object and as far as investigation goes they have really very little to investigate in connection with the offences under the Ordinance. The powers conferred on them are merely for the purpose of due realisation of customs duty and preventing loss of revenue to the State. Their powers are thus different in character from those of the police officers whose main function is the effective prevention and detection of crime and all the powers they enjoy are geared to that end so that law and order in the community may be maintained and preserved. In this context it should

not be overlooked that section 25 of our Evidence Ordinance is identical in terms with section 25 of the Indian Evidence Act 1872 and the courts have always been suspicious of the methods employed by the police in getting confessions for the purpose of securing convictions. It is too much therefore to suppose that the legislature intended to tar all officers with the same brush irrespective of whether they were investigating a matter under a special enactment for a special purpose or under their powers under the Criminal Procedure Code. I am consequently of the view that a customs officer is not a "police officer" within the meaning of section 25 of the Evidence Ordinance. In *Public Prosecutor* v. *Tay Yam Peng*[2] the Court of Appeal followed *Man Woo* v. *Rex*[3] and held that the words "police officer" in section 26 of the Evidence Ordinance were to be given their ordinary everyday meaning and that following that test a chandu officer was not a police officer within the meaning of section 26 of the Evidence Ordinance. Foster Sutton C.J. delivered the judgment of the Court of Appeal in *Public Prosecutor* v. *Tay Yam Peng*[2] but besides saying "We prefer the reasoning in the case of *Rex* v. *Man Woo*.[3] In our view, the words 'police officer' in section 26 of the Evidence Ordinance must be given their ordinary everyday meaning" did not say how that preference and that view was arrived at. [*Rex* v. *Man Woo* referred to in the judgment should, I believe, be read as *Man Woo* v. *Rex*.] All that Murray-Aynsley C.J., said in *Man Woo* v. *Rex*[3] (and he need not have said more) was

"It is true that in a sense the activities of all Government officers engaged in enforcing the law are police duties. It is nevertheless, in my opinion, entirely contrary to the ordinary use of language to describe officers so engaged as police officers."

Mr. Edgar Joseph Jr. in his well sustained and forceful argument rightly conceded that in view of the decision of the Court of Appeal in *Public Prosecutor* v. *Tay Yam Peng*[2] I was bound to hold P.W. 5 and P.W. 7 as persons not falling within the definition of police officers and that my duty was to decide the appeal on that basis alone. He had, therefore, to rely exclusively on section 24 of the Evidence Ordinance.

It can serve no useful purpose if I deal with each and every case cited by the appellant's counsel. Suffice it for me to say that when a statement by an accused is made to a customs officer (who must be taken to be a person in authority) and such statement is not made on account of any inducement, threat or promise, it is admissible under section 24 of the Evidence Ordinance. In the case of *Soni Vallabhdas Liladhar* v. *The Assistant Collector of Customs*[4] the accused carried gold in a bus which was intercepted by the customs officers and this gold recovered from the accused. The accused made a statement to the customs authorities and this statement was signed by the accused and his lawyer. The accused admitted having signed the statement but said that he did not know what the statement contained and that he signed it because he was asked to do so by his lawyer. The trial court found that the statement was not made on account of any inducement, threat or promise and that consequently the statement was admissible under section 24 of the Evidence Act. The lawyer was not called and the Supreme Court held that the statement was properly admitted and that it was not necessary to examine the lawyer as a witness.

Whether a confession made by an accused to a person in authority appears to the court to have been made as a result of any inducement, threat or promise and whether such a confession is, in the context of section 24 of the Evidence Ordinance, made voluntarily is a question of fact. The learned president has held that the statements of the appellant to P.W. 5 and P.W. 7 were voluntarily made and I see no reason to interfere with that finding, and more particularly so when P.W. 7 was not cross-examined at all by the counsel for the accused. The original report of the case *Brown* v. *Dunn*[5] is not available but the relevant passage is reproduced in the case of *A. E. G. Carapiet* v. *A. Y. Derderian*[6] where it is said:

"On this point the most important and decisive authority is *Browne* v. *Dunn*, reported in (1893) 6 R.69. It is a decision of the House of Lords where Lord Herschell L.C., Lord Halsbury, Lord Morris and Lord Bowen were all unanimous on this particular point. Lord Chancellor Herschell, at page 70 of the report, observed:

'Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact. by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'

Lord Halsbury, the other member of the House of Lords, at page 76 of the same report said:

'My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.'

In fact Lord Halsbury described the situation as a 'perfect outrage' at page 77 of the said report. After quoting the evidence the learned Lord said:

'My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all'."

Mukharji J., in this Indian case said:

"The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical

rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated."

It is also to be observed that when the issue of the admissibility of the statements made by the appellant was being tried by the learned president, the appellant chose not to lead any evidence at all on the issue and to rest his case on the prosecution evidence alone. In the circumstances and in the light of the evidence the appellant's contention that his statements to P.W. 5 and P.W. 7 were not admissible is without any substance and merit (See the case of *William Charles Cowell*[7]).

Section 113 of the F.M.S. Criminal Procedure Code (= section 124 S.S. Criminal Procedure Code) makes the statements made in the course of police investigations inadmissible in evidence except for the limited purpose specified in section 113 (ii) and in case such statements are made by the accused they are declared totally inadmissible. The position is different in England where a statement by an accused to a police officer in the course of questioning is admissible if it is shown that it was not made as a result of any inducement, threat or promise. It was for that reason that Judges' Rules were framed for the guidance of police officers there. The provisions of our Criminal Procedure Code provide a better safeguard for the accused. A number of cases under the Emergency Regulations were cited to me. The decisions under those Regulations cannot be stretched to apply even by analogy to offences under the Customs Ordinance (See *Public Prosecutor* v. *Soh Tuan Cheung*[8]). Spenser Wilkinson J., in the case of *Chye Ah San* v. *Regina*[9] said:

"I am unable to accept Mr. Conaghan's contention that the earlier statements made by the appellant stand on the same footing as the written statement. I think an excise officer when carrying out his duties of enforcing the law is in a very similar position to that of a police officer in England. As was said by Murray-Aynsley C.J., in *Rex* v. *Man Woo*[3]: 'It is true that in a sense the activities of all Government officers engaged in enforcing the law are police duties.' Quite apart from any specific provision of the Enactment I can see no reason why such an officer should not ask questions from persons whether suspected or not from whom he thinks useful information can be obtained, as laid down in the first of the Judges' Rules; and as neither section 124 of the Criminal Procedure Code nor sections 25 and 26 of the Evidence Ordinance apply to customs or excise officers there is nothing in law to prevent the answers given to them by a person subsequently accused of an offence from being used in evidence provided the court is satisfied that those answers were voluntarily given."

Spenser Wilkinson J. then went on to quote *Regina* v. *Bass*[10] and suggested that the trial court could in its discretion refuse to admit the statement. It is, I think, not a question of the observance or application of the Judges' Rules (which we do not have) but the general principles enunciated in section 24 of the Evidence Ordinance. If the conduct of the customs officer in dealing with the accused and in obtaining information from him is such that it tends to arouse a doubt as to his probity and good faith, the confession is not admissible and it is for that reason that the word "appears" has been used in section 24 of the Evidence Ordinance. It imports a far lesser degree of probability than proof. In making it appear to the court that the confession was not voluntary the standard of a prudent man is not completely displaced but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted, however, does not warrant the court to base its opinion upon pure surmise. The standard laid down requires the foundation of an opinion resulting from the evidence and the circumstances of the case. It is in the ultimate analysis the opinion of the court (which is called upon to exclude a confession) that is material for it is that court alone which is required to hold that in the circumstances of a particular case the confession is not voluntary.

I find no rule whether of law or practice which requires a customs officer in this country to follow the Judges' Rules framed by the judges in England. It is a matter for the legislature if it feels that an inquiry under section 24 of the Evidence Ordinance is not capable of yielding an equally effective result. It seems that even in England the absence of a caution does not as a matter of law make the statement inadmissible although it may be a circumstance to be taken into account by the court in the exercise of its discretion whether to exclude the statement or not (*The King* v. *Voisin*[11]).

Objection is taken to P.W. 5 acting as an interpreter for P.W. 7 and reliance is placed by the appellant on the cases of *Cheong See Leong* v. *Public Prosecutor*[12] and *Cheng Seng Heng & Others* v. *Public Prosecutor*.[13] Both these cases were cases under the Emergency Regulations. In the case of *Cheong See Leong* v. *Public Prosecutor*[12] Spenser Wilkinson J. said:

"There are numerous decided cases which have laid down the principle that judicial officers are required to be free from bias when adjudicating on any particular case before them. Those cases have decided that when a judicial officer is interested in the subject matter of any case before him the presumption is that he cannot be free from bias. It may be, in such a case that his adjudication is free from all bias. That is not the test. The test is whether there is a likelihood of bias arising from his interest in the subject matter. If there is that likelihood then his adjudication cannot stand. In other words, the test is whether a judicial officer is so interested in the case that he should not have sat to adjudicate upon it. We think that the same principles must be applied in regard to interpreters in a case such as this.

The only authority which was cited to us on the question of interpretation was the case of *Ah Soi* v. *King Emperor*[14]. In that case a witness who had personally interested himself in the police investigations and himself gave evidence before the committing magistrate and again in the sessions court was used as interpreter for the other witnesses in the latter court. In the judgment in that case the following remark was made:

'The procedure adopted by the learned sessions judge has had the effect of placing the accused more or less at the mercy of the interpreter...'

It was held that the procedure adopted was opposed to elementary ideas of justice.

In the case before us the statement of the appellant was interpreted by detective sergeant No. 180 who, as appears from the record, was fully conversant with all the material facts and was subsequently called by the prosecution as their principal witness to prove those facts. Accordingly there is no doubt that he had a real interest in the subject matter of that statement. Hence applying the abovementioned test there was the likelihood of bias when he interpreted."

At 23rd mile Tebong P.W. 5 spoke to the appellant in Hokkien without the aid of any interpreter. The appellant when giving evidence in court spoke in Hokkien. An admission was made to P.W. 5 at Tebong and nowhere in the cross-examination of P.W. 5 has it ever been suggested that he did not interpret to P.W. 7 the exact words of the appellant. In the Australian case *R.* v. *Czerwinski*[15] it was held that there was no rule of law or practice that whenever a man with an imperfect knowledge of English was interrogated without the presence of an interpreter, statements made by him were inadmissible. I find nothing in the record which may tend to cast any doubt on the evidence of P.W. 5 or P.W. 7. If the proposition suggested by the appellant is the law, not only the customs officers but all enforcement officers must carry with them a retinue of interpreters in the discharge of their day to day duties. Each case has to be decided on its own facts. To disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary interest) in the subject matter of the proceedings a real likelihood of bias must be shown (See *Regina* v. *Camborne Justices Ex parte Pearce*,[16] *The Queen* v. *Farrant*[17] *The Queen* v. *Rand*[18]). In the case of *Regina* v. *Camborne Justices Ex parte Pearce*[16] Slade J. dealt with the "suspicion" test and quoted the following passage from the judgment of Lord Hewart C.J. in *Rex* v. *Sussex Justices Ex parte McCarthy*: [19]

"But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

Slade J. then very aptly dealt with the matter thus:

"The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of Lord Hewart C.J., in *Rex v. Sussex JJ. Ex parte McCarthy*[19] that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the filmsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart C.J., this court feels that the continued citations of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

Legal maxims are undoubtedly a condensation and an embodiment of the first principles. It is not necessary to deal with the present day universality or otherwise of their application in systems of law akin to ours. The facts of this case do not call for any such discussion. It was stressed that no man can be compelled to criminate himself (*Nemo tenetur seipsum accusare*). The maxim is, in fact, linked up with the question of administration of caution, the free and voluntary nature of a confession and the right to use this confession against the person making it if that person is subsequently arrested and charged. Alderson B. in *Udal* v. *Walton*[20] said that "a man is *competent* to prove his own crime but not *compellable*." The case of *Chye Ah San* v. *Regina*[9] was again cited in this connection as also the case of *Goh Yin Guan* v. *Public Prosecutor*.[21] MacIntyre J. (as he then was) said in the latter case:

"The law on this point is quite clear. Generally speaking, a statement made by an accused person to a customs officer is admissible in evidence whether he had been cautioned or not. It is, however, desirable that a person subsequently charged with an offence should have been cautioned but the failure to caution would not render the statement inadmissible, if made voluntarily and is not self-incriminating. What is inadmissible is a confession made in breach of the provisions of section 24 of the Evidence Ordinance even though under the provisions of sections 97 and 130 of the Customs Ordinance 1952, an accused person is bound to answer truthfully questions put by a proper officer of customs on pain of being prosecuted for not answering any question or giving a false answer. This conflict between section 24 of the Evidence Ordinance and sections 97 and 130 of the Customs Ordinance was resolved in favour of the former superseding the latter in deference to the rule embodied in the maxim *nemo tenetur seipsum accusare* (See *Chye Ah San* v. *R.*[9])."

The editor of *Broom's* Legal Maxims seems now to concede that the supervening importance of the maxim has been, with the growth of legislation, greatly reduced and modified. He says "as has been already indicated, the maxim, *nemo tenetur seipsum accusare*, still holds good to this extent, that the person charged cannot be compelled to enter the witness box against his will." A careful analysis of the judgments in the two cases (*Goh Yin Guan* v. *Public Prosecutor*[21] and *Chye Ah San* v. *Regina*[9]) tends to lead to the proposition that an express provision of a statute is to be subordinated to a rule which finds no place in our statute book. I am unable to agree with that proposition. It is "every person" that is legally bound to give information to a customs officer under section 97 of the Ordinance. If a person is suspected of having committed an offence and the customs officer is satisfied by questioning him that an offence has in fact been committed, then to exclude such a person from the ambit of the words "every person" in section 97 of the Ordinance and to exclude the information obtained under that section would be to defeat the very object and purpose of that section. It would only be to give the words "every person" a meaning totally different from what those words in plain and simple language mean. It would sin against the ordinary rules of construction. If there is an obligation under the law to tell the truth, the performance alone of such an obligation cannot be equated to a threat unless in the manner and mode of questioning a threat could be reasonably inferred having regard to all the surround-

ing circumstances. The investigation which a customs officer normally carries out at the customs check or by stopping the goods while in transit is a very limited investigation confined mainly to the questioning of the person in charge of the goods and, if that person were to be excluded, there can hardly be any evidence which the customs authorities may be able to produce relevant to the charge. The ordinary provisions of section 24 of the Evidence Ordinance must apply to such questioning and the information received as a result thereof.

The fact that the appellant made statements to P.W. 5 and P.W. 7 is only an additional piece of evidence against him. Even if these statements were excluded, there was the recovery of uncustomed goods not included in Exhibit P1A and Exhibit P1B, there was the reluctance of the appellant to answer at the 23rd mile Tebong, there was the fact that more undeclared goods were in fact found on top of the van when P.W. 7 asked P.W. 6 to examine them at Malacca than the mere one gross of playing cards which alone the appellant admitted to P.W. 5 and P.W. 7 and there was also the fact that the appellant's defence stood shattered and condemned with the result that whatever little onus the law cast on him remained undischarged.

I need not deal with the other grounds at length by repeating that a statement made to a customs officer is admissible in evidence when it is not shown that the customs officer made any inducement or used any force. When, however, the statement is retracted at the trial, corroboration should as a rule be necessary in order to satisfy the court that the statements can be acted upon. It is not necessary that every material fact in the confessional statement should be corroborated. The conduct of the accused which proved that he had a guilty mind may be relied upon as sufficient corroboration. I am also of the view that if in fact there is sufficient corroboration but the magistrate or the president fails to deal with that aspect of the matter in his grounds of judgment, that fact alone does not disentitle the appellate court to look for and find corroboration in the evidence produced in the trial court. (See *Pyare Lal* v. *State of Rajasthan*,[22] *Abdul Majid* v. *Public Prosecutor*[23] and *Lee Kim Yin* v. *Public Prosecutor*[24]). The learned president seems to have had no doubt about the truth of the confessionary statements made by the appellant to P.W. 5 and P.W. 7 and looking at the whole of the evidence I too have no doubt as to the truth of those statements (See *Lee Kim Yin* v. *Public Prosecutor*[24]).

Some criticism was levelled against the learned president in that he did not consider those parts of the statement of P.W. 2 which were favourable to the appellant. There is not much substance in that accusation if one reads the evidence of P.W. 2 as a whole and not in isolated pieces and especially when one bears in mind that the goods Exhibit P6, Exhibit P7 and Exhibit P8 were placed on top of the van covered with tarpaulin and P.W. 2 checked only one or two items from among the goods on top of the van.

Another ground which was urged at the hearing of the appeal was that the learned president in his grounds of judgment had not sufficiently given his reasons in order to qualify his judgment to be called a speaking judgment and that he should have dealt with all the points which have now been raised in this appeal. I do agree with the learned counsel for the appellant that the conclusions at which the court arrives ought normally to be supported by reasons duly recorded and that this requirement transcends all technical rules of procedure. I, however, am not prepared to agree that on that ground alone the judgment of the trial court could be set aside. In giving his grounds of judgment the learned magistrate (or the learned president) should briefly state the matters both of fact and law which he considered, the care which he exercised in considering those matters, and the extent and nature of doubt, if any, created in his mind. He should discuss the evidence and the probabilities arising from the circumstances of the case. The reasons for his findings should be stated. The grounds should indicate that he had in fact applied his mind to the evidence produced in the case. (See *Balasingham* v. *Public Prosecutor*[25]). I do not blame the learned president. There are always practical difficulties. He could and should have done better but how much! How much more, it may still be complained, I should also have covered and dealt with in this judgment!

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Joseph & Son.*

COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA v. T

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 98 of 1969]

Income Tax — Gains or profits from employment — Redundancy pay — Compensation for loss of office — Retiring gratuity — Income Tax Ordinance, 1947, s. 10(b).

The respondent was employed as Chief Staff Surveyor with the Malaya-Borneo Building Society. He was told by a letter dated February 3, 1960 that if at any future time it be necessary to declare expatriate staff redundant, staff surveyors would be granted compensation for loss of office on terms not less generous than those that apply to redundancy. On November 25, 1965 the respondent was informed that he would be declared redundant and paid redundancy pay of $28,050. The Comptroller-General declared this sum to be chargeable for income tax "as gains or profits from employment" and his view was upheld by the Special Commissioners of Income Tax. On further appeal by way of case stated to the High Court, Chang Min Tat J. reversed the decision of the Special Commissioners. The Comptroller-General appealed to the Federal Court.

Held, dismissing the appeal: (1) on the facts it was not part of the service agreement that the society could terminate services of the respondent by paying him an agreed amount and therefore the sum paid was not paid under the contract of service;

(2) the respondent's employment was an employment which was likely to continue so long as he carried out his duties faithfully and until the society decided to ask him